

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1341

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,

-against-

Docket No. 74-1341

ERIC LINCOLN SELIGSON,
Defendant-Appellant

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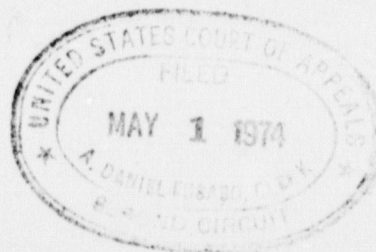
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On Appeal From The United States District
Court For The Southern District of New York

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a conviction of appellant, after trial, for his failure to keep his local board advised of an address where mail would reach him, under Section 462(a) of the Universal Training and Service Act of 1951, 32 C.F.R. § 1641.3.

Mr. Seligson registered with the Selective Service System in September of 1964. He gave his address as 1370 St. Nicholas Avenue, New York City. In July of 1965, appellant notified his local board that his new address was in Palisades Park, New Jersey. A month later, he informed the board that mail should henceforth be sent to a San Francisco address and to American Express, London, since he was travelling abroad.

On November 15, 1965, the local board sent a notice to Mr. Seligson to report for a physical examination. However, the notice was only sent to the San Francisco address which he had given. Appellant's mother wrote the board stating that appellant was travelling abroad and was not in San Francisco. On November 26, 1965, a copy of the letter was sent to Mr. Seligson, c/o American Express, London, but it was returned "Unclaimed - Not Known" in March of 1966.

On March 23, 1966, a letter was sent to Mr. Seligson's mother at the San Francisco address and to the original New York City address he had given; the letter warned of his delinquency. Appellant's mother wrote the board that she would

try to contact him, suggested the address 1350 St. Nicholas Avenue, New York City and asked that the board not declare him delinquent while she was attempting to reach him. On March 30, 1966 and April 4, 1966, forms were sent to the St. Nicholas Avenue address, but were both returned unopened to the local board. No correspondence was directed to the American Express, London address at this time, although his mother wrote to the board on April 8, 1966 advising it that the only address she could suggest was that American Express office. On April 13, 1966 another letter was sent to Mr. Seligson at American Express, London; it was returned "Unclaimed - Not Known."

On May 12, 1966, the local board reported appellant to the United States Attorney for his failure to keep his local board informed of an address where mail could reach him, as well as for his knowing failure to report for his armed forces physical examination and his knowing failure to report for induction. Mr. Seligson was indicted on each of these three counts.

Trial was commenced in November of 1973. Appellant moved that the counts were inconsistent, and also moved to inspect the grand jury minutes. A second indictment came down after the trial had begun. This indictment, which superseded the prior one, only charged Mr. Seligson with a failure to keep his board informed of an address where mail could reach him. Conviction was based on this second indictment.

QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief on appeal is addressed to the following questions:

1. Was the appellant entitled to access to the original grand jury minutes.
2. Did appellant have the requisite intent to commit the offense of which he was convicted.

SUMMARY OF ARGUMENT

- I. APPELLANT WAS ENTITLED TO REVIEW THE ORIGINAL GRAND JURY MINUTES.
- II. APPELLANT DID NOT HAVE THE REQUISITE INTENTION NOT TO KEEP HIS BOARD INFORMED OF AN ADDRESS WHERE MAIL COULD REACH HIM.

ARGUMENT

POINT I

APPELLANT WAS ENTITLED TO
REVIEW THE ORIGINAL GRAND
JURY MINUTES.

The conviction appealed herein resulted from a trial which began with a three count indictment which was superseded by a one count indictment containing one of the original three charges. Appellant may therefore, still appeal the refusal of the court below to permit him to review the three count indictment. Any irregularity in the proceedings of the grand jury in handing down the indictment which initiated the trial cannot be sanitized by having the United States Attorney go back for a second indictment which stems directly from the original one.

We feel that the trial judge erred in not permitting the appellant to review the grand jury minutes of the first indictment. The charges in that indictment were clearly inconsistent. An individual cannot at the same time fail to keep his local board informed of an address where mail can be sent to him, and also intentionally fail to report for a physical examination and induction. He is informed of his obligations to report by mail. Judge Frankel of the Southern District articulated the notion that bringing such an indictment is simply unfair, in United States v. Jarvis, 6 SSLR 3077 (1972),

and would not permit the government in the case to proceed under it. Since the combining of these charges is inconsistent and, according to the Jarvis Case, also unfair, it certainly could be presumed that, when these charges were presented to a grand jury, the manner that the evidence was presented was also unfair. If the allegation that an individual failed to keep the board informed of his current address is proven to be true, then the other charges in the original indictment must fall; if an individual is indeed guilty of knowingly failing to report for a physical or for his induction, then the charge that he did not keep his board advised of an address must necessarily fall. Appellant therefore moved to review his grand jury minutes in an effort to determine how the three charge indictment was secured, and whether there were any irregularities.

A defendant may only normally review the grand jury minutes where he demonstrates a "particularized need" which overcomes the tradition of maintaining their secrecy. Dennis v. United States, 384 U.S. 855 (1966). The normal practice is not to allow such a review, Costello v. United States, 350 U.S. 359 (1956). That case, in which all the evidence presented to the grand jury was apparently hearsay, supported the rule that an indictment returned by a duly constituted grand jury is sufficient if it appears valid on its face. Appellant has no argument with that rule. Our contention is that the ori-

ginal contradictory indictment charging Mr. Seligson with three selective service offenses was potentially invalid on its face. It can only stretch one's imagination to the limit to discern how a prosecutor could have secured those charges on one indictment without some irregularity having occurred in the presentation of the evidence.

Judge Cannella, in refusing the motion below, cited United States v. Cummings, 49 F.R.D. 160 (S.D.N.Y. 1969) for the proposition that an indictment is presumed valid unless it is shown that "it is premised upon insufficient evidence or that it resulted from a gross prejudicial irregularity." The fact that the counts in the original indictment would cancel each other is adequate grounds for deciding that the evidence upon which they were brought was insufficient. Both the Cummings test and the demonstration of "particularized need" mandated by Dennis would therefore be met.

This court has previously ruled on the question involved in the instant case in United States v. Youngblood, 379 F2d 365 (2d Cir. 1967). The decision there, while not permitting a review of the minutes based upon the facts presented, did say that "...as the Court pointed out in Dennis there has been a 'growing realization' that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of justice." United States v. Youngblood, supra at 369.

One of the criteria used by the Dennis court in determining that the minutes were reviewable by the defendant was the fact that there was a minimal need for the secrecy which normally attaches to the proceedings. In the instant case also, that requirement is minimal. The evidence in the selective service offense charged here normally only involves the testimony of local board officials. There is no indication that there is an urgency to keep the identity of the witnesses or the content of their testimony secret.

A note in the New York University Law Review about the Youngblood decision cited the prior case of Jencks v. United States, 353 U.S. 657 (1957) in remarking that the trend has been toward permitting greater review of grand jury minutes since "...it is possible that the mere omission of certain subjects in trial testimony would be sufficient to constitute an inconsistency suitable for impeachment purposes ..." 43 N.Y.U.L.R. 194 (1968). If omission of testimony at a trial that may have been used at the grand jury could be sufficient grounds for searching grand jury minutes for inconsistencies, surely an indictment which strongly suggest that there was inconsistent testimony in front of the grand jury would also be sufficient grounds.

We urge that the court adapt this more liberal policy of permitting review of the minutes and decide that appellant was indeed entitled to see them at the trial.

POINT II

APPELLANT DID NOT HAVE THE REQUISITE
INTENTION NOT TO KEEP HIS BOARD INFORMED
OF AN ADDRESS WHERE MAIL COULD REACH HIM

The statute under which appellant was convicted involves his knowing failure to keep the board informed of his address. A requisite for conviction then is that it was Mr. Seligson's intention not to let the board know where he ^{could} be reached. Neither the facts in this case nor the law on this point regarding the intention of the registrant appear to support the appellant's conviction for this offense.

After appellant gave his initial address, he moved to New Jersey and informed the board of that change. He then again moved and his mother's address in San Francisco was the only one in the United States where he thought he could be reached. Therefore, he furnished that one to the board. He planned to travel abroad, and gave the London American Express office as another address where he could be reached. The local board was also furnished with alternate addresses by Mr. Seligson's mother, although attempts to reach him at those addresses proved unsuccessful.

The leading case in this area, Bartchy v. United States, 319 U.S. 484 (1943), holds that a registrant is not required to report his every move to the board. This case

only requires that the registrant designate a suitable means for being reached and that he "...in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance." 319 U.S. at 489.

The fact that Mr. Seligson was not actually reached by mail does not necessarily mean that he did not leave addresses which he reasonably expected would enable him to receive mail from his local board. During 1965, appellant moved several times and notified the board of each change. When he knew that he was leaving the country, he provided the best address at which he felt he could be reached. He obviously moved frequently, and it would not have been practical to note every change to the board.

The Bartchy standard was applied in United States v. Ward, 344 U.S. 924 (1953). There, defendant Ward registered with his local New Orleans board, stating that he was a student in Ohio, noting his college as his "employer," and giving his mother in New Orleans as the person who would always know his address (PAKA). Efforts to reach him at his New Orleans address failed, but a completed questionnaire was later returned with a New York City residence and employer. Further correspondence sent by the board to the New York City residence was "Returned to Sender".

Correspondence with the PAKA resulted in the board sending letters to still another New York City address, but these additional letters were also returned by the post office. Efforts to reach the defendant through his college proved fruitless.

The evidence at trial (summarized at 195 F2d 441) showed that the defendant had frequently changed his residence and that the selective service card provided only for the address of a registrant's original employer and not for any change of employer. The Court found that "the record does not support the charge that, during (the period involved) there was deliberate purpose on the part of petitioner not to comply with the Selective Service Act or the regulation (regarding address) issued thereunder." 344 U.S. at 924.

The key element in determining the registrant's intent, according to Bartchy, is whether he demonstrated his "good faith" in keeping the board informed. While two letters were unsuccessfully sent to the appellant at the American Express office, this hardly indicates that Mr. Seligson did not intend for mail to reach him abroad. The San Francisco address he gave was a reasonable one, since a relative was there. The fact that he lost touch with her after 1965 does not mean that he gave the address in bad faith.

As in the Ward Case, the fact that mail from the local board did not reach the appellant was not the result of

his intention not to keep it informed of his address. The government has not proved beyond a reasonable doubt that he had the requisite intent. The conviction which required that state of mind should therefore be reversed.

The opinion below, at p.9, cites United States v. Buckley, 452 F2d 1088 (9th Cir., 1971) and United States v. Booth, 454 F2d 318, 322 (6th Cir. 1972) as support for stating defendant Seligson's "guilty intent" is evidenced by the fact that he had given his mother's address to the board, yet she did not know where he was. In Buckley, the registrant never did anything more than give her address when he first registered. No effort was ever made by the registrant to note his new address when he moved. Appellant here, on the other hand, note his address change twice to his board, and in fact gave two optional addresses after one of his moves. The "good faith" mandated by Bartchy surely was lacking in registrant Buckley, since he did not make the effort which Mr. Seligson did. The facts in Booth are clearly distinguishable from those now before the court. He not only failed to give the board a proper address, but also falsely wrote on the envelopes sent to him that he had moved. The court there reasoned that the "... evidence of bad faith and an affirmative endeavor to avoid delivery of the notice - which the Supreme Court found to be lacking in the Bartchy case..." mandated conviction. No such evasive actions were evidenced regarding Mr. Seligson.

The opinion below also cites United States v. Haug, 150 Fed 911 (2 Cir., 1945) for the general proposition that "The regulation (regarding leaving an address) is violated when a registrant no longer calls for mail at an address which he has furnished to the board". This proposition was used to demonstrate that the failure of the appellant to get his mail at American Express was an indication that he deliberately left an address at which he did not intend to pick up mail. Mr. Seligson was travelling abroad. Such trips often do not have a scheduled itinerary. The mere showing that appellant did not pick up mail in his travels hardly overcomes the reasonable doubt that he meant to be reached there but had an intervening change of plans.

CONCLUSION

Defendant respectfully requests an acquittal. The court below erred in its refusal to permit appellant to review the grand jury minutes of the original indictment, although the inconsistencies on the face of the indictment clearly demonstrated a "particularized need" for such a review.

Further, the government has failed to prove beyond a reasonable doubt that Mr. Seligson had the requisite intent to commit the offense for which he has convicted.

Dated: New York, New York

April 30, 1974

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